# Supreme Court of Kentucky

2015-SC-000461-D
COURT OF APPEALS CASE NOS. 2013-CA-001695 and 2013-CA-001742

On Appeal from Franklin Circuit Court
Civil Action No. 11-CI-01613

LOUISVILLE GAS AND ELECTRIC COMPANY — APPELLANT

v.

KENTUCKY WATERWAYS ALLIANCE,
SIERRA CLUB, VALLEY WATCH,
SAVE THE VALLEY, AND COMMONWEALTH
OF KENTUCKY ENERGY AND ENVIRONMENT CABINET — APPELLEES

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## BRIEF FOR APPELLANT
## LOUISVILLE GAS AND ELECTRIC COMPANY

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John C. Bender
R. Clay Larkin
DINSMORE & SHOHL LLP
250 West Main Street, Suite 1400
Lexington, KY 40507
Telephone: 859-425-1000
Facsimile: 859-425-1099

Sheryl G. Snyder
Jason P. Renzelmann
FROST BROWN TODD LLC
400 West Market Street, 32nd Floor
Louisville, KY 40202-3363
Telephone: 502-589-5400
Facsimile: 502-581-1087

## CERTIFICATE OF SERVICE

It is hereby certified that pursuant to CR 76.12(5) that a true copy of this Brief for Appellant was served by First Class U.S. Mail, postage prepaid this 11th day of April, 2016, to Joe F. Childers, Jr., Joe F. Childers & Associates, The Lexington Building, 201 West Short Street, Suite 300, Lexington, KY 40507; Nathanial Shoaff, Andrea Issod, Sierra Club, 85 Second Street, Second Floor, San Francisco, CA 94105; Christopher R. Fitzpatrick, Energy & Environment Cabinet, 2 Hudson Hollow, Frankfort, KY 40601, Counsel for Appellees; Sally Jump, Franklin Circuit Court Clerk, Franklin County Courthouse, 222 St. Clair Street, Frankfort, KY 40601; and Honorable Phillip Shepherd, Chief Circuit Judge, Franklin County Courthouse, 222 St. Clair Street, Frankfort, KY 40601; Sam Givens, Clerk, Court of Appeals of Kentucky, 360 Democrat Drive, Frankfort, KY 40601.

An Attorney for Appellant

## INTRODUCTION

In this administrative appeal, the Franklin Circuit Court and Court of Appeals reversed the Energy and Environment Cabinet's approval of a Clean Water Act ("CWA") permit issued to Louisville Gas and Electric Company for its Trimble County Generating Station, incorrectly holding that the Cabinet was required to use "best professional judgment" to formulate ad hoc case-by-case effluent limitations on wastewater discharges from Trimble's air pollution control systems beyond those imposed by the Environmental Protection Agency's ("EPA") existing nationwide effluent limitation guidelines ("ELGs"), even though the CWA plainly states that such ad hoc limitations are not required to be imposed where EPA has promulgated nationwide ELGs, and even though the EPA reviewed the Trimble permit and raised no objection to the permit. The Court of Appeals' construction of the CWA is contrary to the plain language of the statute, and casts a cloud of uncertainty over all state-issued CWA permits that incorporate national ELGs, threatening to create the very state-by-state patchwork of uneven and inconsistent regulation that the CWA sought to eliminate.

## STATEMENT REGARDING ORAL ARGUMENT

The Court of Appeals' unprecedented construction of the Clean Water Act and its implementing regulations raises critically important legal questions about the duties of regulated entities and state regulators under the state-administered Clean Water Act permit program, which promise to have significant impacts far beyond the specific circumstances presented in this appeal. Given the importance of the legal questions, and the complexity of the underlying legal framework and factual record, Appellant believes oral argument would be of great assistance to the Court in resolving this appeal.

## STATEMENT OF POINTS AND AUTHORITIES

## STATEMENT OF THE CASE

This appeal arises from the Division of Water's ("DOW") issuance of a Kentucky Pollutant Discharge Elimination System ("KPDES") permit (the "Permit" or "Trimble Permit") for Louisville Gas and Electric Company's ("LG&E") Trimble County Generation Station ("Trimble"). Trimble is a coal-fired electric power generating facility, which has been in operation since 1990. The Trimble Permit was issued in 2010 as a renewal of the previously-in-force KPDES Permit for the Trimble facility. The Permit comprehensively regulates wastewaters discharged from the Trimble facility pursuant to the CWA and federal and state implementing regulations.

This appeal particularly concerns the Trimble Permit's provisions governing wastewaters from wet scrubber air pollution control systems, known as flue gas desulfurization ("FGD") systems, which are used to remove pollutants from the exhaust created by coal combustion. FGD systems create wastewaters containing pollutants that are removed from the flue gas.

### The Clean Water Act

The Trimble Permit specifies the limitations on wastewater emissions that the Trimble facility must achieve to comply with the Clean Water Act ("CWA"). The CWA, like many modern federal pollution control statutes, adopts a scheme of cooperative federalism for the control of wastewater discharges whereby state government agencies play a primary role in administering and enforcing the requirements of the Act.

The CWA regulates the discharge of pollutants into U.S. waterways through a nationwide permitting scheme referred to as the National Pollutant Discharge Elimination System ("NPDES"). Under the CWA, the discharge of any pollutant is unlawful, unless

the discharger is in possession of, and in compliance with, an NPDES permit that limits the amount and kinds of pollutants that can lawfully be discharged.[1]

The CWA provides for administration of the NPDES program to be delegated to the states.[2] The Cabinet administers Kentucky's permit program (the KPDES program) pursuant to KRS 224.16-060 and its implementing regulations. "States issuing permits pursuant to § 1342(b) stand in the shoes of the [EPA]."[3] However, states must submit proposed permits to EPA for review, and EPA has authority to object to any permit that is inconsistent with the CWA.[4]

The CWA provides for two types of "effluent limitations"[5] on discharges of water pollutants to be included in NPDES permits. Technology-based effluent limits, or "TBELs," establish limits on discharges of pollutants based on the level of pollution reduction that can be achieved using a designated model pollution treatment technology, which is selected by EPA based on its evaluation of statutorily-prescribed performance and cost factors.[6] Technology-based limits do not necessarily require industry permit-holders to use the selected technology. Rather, EPA selects the model technology to determine the level of pollution reduction that can be achieved, and allows permit holders to choose for themselves how to achieve those levels. This approach is intended to encourage technological innovation by giving permit holders flexibility to find ways to achieve the prescribed pollution reduction levels more efficiently.

The CWA also permits states to impose water-quality based effluent limits, or

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[1] 33 U.S.C. § 1311. *See also NRDC v. EPA*, 822 F.2d 104, 108 (D.C. Cir. 1987).
[2] 33 U.S.C. § 1342(b).
[3] *NRDC v. EPA,* 859 F.2d 156, 183 (D.C. Cir. 1988).
[4] 40 C.F.R. § 123.44. *See also NRDC v. EPA,* 859 F.2d at 183-88.
[5] An "effluent limitation" is "any restriction... on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance." 33 U.S.C. § 1362(11).
[6] *NRDC*, 822 F.2d at 123.

"WQBELs," when necessary to address water quality conditions in the specific bodies of water into which a particular facility discharges. Thus, if the permitting authority concludes that a facility's operation in accordance with the technology-based limits for that industrial category will nonetheless impair the intended use of a body of water into which it discharges, the authority must impose supplemental water-quality based limits.[7] This appeal concerns only technology-based limits.

**Effluent Limitation Guidelines**

The centerpieces of the CWA's technology-based regulatory scheme are national Effluent Limitation Guidelines ("ELGs") promulgated by EPA. ELGs are federal regulations, which prescribe technology-based effluent limitations that are uniformly applicable, nationwide, to all facilities within defined industrial categories. The CWA's reliance on national, industry-wide ELGs reflects Congress' view that uniform regulation is the best approach to effectively controlling water pollution and creating a level playing field.[8] The CWA requires EPA to periodically review its ELGs, and revise them as needed to reflect advancements in technology.[9]

Section 402 of the CWA provides that when the EPA has published an ELG applicable to an industrial category, NDPES permits issued to facilities within that category must reflect the numeric limitations contained in the nationwide ELG.[10] NPDES permits must be renewed at least every five years to ensure that permits will be updated periodically to incorporate the most up-to-date ELGs.[11]

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[7] 33 U.S.C. § 1312. *See also NRDC v. EPA*, 822 F.2d at 110 (CWA mandates the imposition of supplemental water-quality based effluent limits "[w]henever a technology-based effluent limitation is insufficient to make a particular body of water fit for the uses for which it is needed.").
[8] *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 129 (1977).
[9] 33 U.S.C. § 1314(m); 33 U.S.C. § 1311(d).
[10] 33 U.S.C. § 1342.
[11] 33 U.S.C. § 1342(a)(3), (b)(1)(A); *Texas Oil & Gas Ass'n v. EPA*, 161 F. 3d 923, 928 n.3 (5th Cir. 1998).

ELGs do not contain numeric effluent limits for every pollutant in a given waste stream. Indeed, EPA has acknowledged that "it is **impossible** to identify and rationally limit every chemical or compound present in a discharge of pollutants," since any discharge may contain "hundreds or thousands" of chemical compounds.[12] EPA typically focuses on the primary pollutants in a wastestream or prescribes limits for certain "indicator" pollutants that will reduce other pollutants as well.[13] In determining whether to set a limit for a given pollutant, EPA also "considers whether a pollutant is present in the process wastewater at treatable concentrations and whether the model technology for effluent guidelines effectively treats the pollutant."[14]

The CWA provides differing levels of stringency for the technology-based limits that may be included in an NPDES permit. These levels are promulgated based upon the nature of the pollutants and whether the facilities discharging them are new or existing. Some pollutants and facilities are required to meet standards based on the "Best Practicable Control Technology Currently Available" ("BPT"), which reflects the average of the best performance of comparable existing facilities. Limitations on toxic and nonconventional pollutants discharged from existing facilities are established based on the more stringent "Best Available Technology Economically Achievable" ("BAT") standard, which is determined based on consideration of a variety of factors, including age of facilities, cost, engineering factors, and non-water quality impacts.[15]

The CWA also provides that "New Sources" – those constructed after the

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[12] *Sierra Club v. ICG Hazard, LLC*, 781 F.3d 281, 287-88 (6th Cir. 2015) (quoting *In re Ketchikan Pulp Co.*, 7 E.A.D. 605, 1998 WL 284964, at *9 (E.P.A. May 15, 1998)).
[13] *NRDC v. EPA*, 822 F.2d at 125; EPA, NPDES Permit Writers Manual, Sept. 2010 ("2010 NPDES Permit Writers Manual") at p. 5-18 (available at https://www.epa.gov/sites/production/files/2015-09/documents/pwm_2010.pdf) (last visited April 6, 2016) (excerpts attached at Apx. L).
[14] 2010 NPDES Permit Writers Manual, *supra* note 13, at p. 5-18 (Apx. L).
[15] 33 U.S.C. §1314(b)(2)(B).

promulgation of applicable effluent limitations by the EPA – must meet "Best Available Demonstrated Control Technology" ("BADCT") standards, also known as "New Source Performance Standards" ("NSPS").[16] NSPS standards represent the most stringent level of technology-based controls, recognizing that new sources are best able to adopt new technologies.

Applicable effluent limits for each of these standards (BPT, BAT, and NSPS) are prescribed in the ELGs for each source category. In this case, because the Trimble facility was constructed after the promulgation of the 1982 ELGs, which were in force at the time the 2010 Trimble Permit was issued, the Trimble Permit was based upon the "new source" or NSPS standards in those ELGs.

**Best Professional Judgment Limitations**

When Congress first adopted the CWA's NPDES permit system and technology-based regulatory regime in the 1972 amendments to the CWA, it recognized that EPA likely would not have completed the enormous and time-consuming task of promulgating national ELGs for many industrial categories by the time the first NPDES permits were to be issued. To address this concern, CWA Section 402 provides that "prior to" EPA's promulgation of national ELGs for an industrial category, permits may be issued to specific facilities on an ad hoc case-by-case basis upon "such conditions as the Administrator determines are necessary to carry out the" CWA.[17] These technology-based effluent limits that are prescribed based on ad hoc case-by-case judgments by the state permitting authority, rather than on a national ELG, are referred to as "best professional judgment" or "BPJ" limits. Congress included BPJ permitting as a means of

[16] 33 U.S.C. § 1316.
[17] 33 U.S.C. § 1342.

requiring cost-effective treatment technologies to be applied by dischargers in the interim period before EPA is able to promulgate an ELG for the relevant industry category.[18]

**Steam electric ELGs and regulation of FGD wastewaters**

EPA has promulgated nationwide ELGs for the steam electric generating industry. The steam electric ELGs in force at the time the Trimble Permit was issued had last been revised in 1982.

Under those ELGs, Trimble's FGD wastewaters were expressly regulated as part of the defined category, "low volume waste sources." Pursuant to the ELGs, Trimble's FGD wastewaters were subject to numeric technology-based limits for Total Suspended Solids ("TSS") and oil and grease.[19] The ELGs also identified 34 toxic pollutants present in low volume wastewaters – including arsenic, mercury, and selenium – that were "excluded from national regulation because they are present in amounts too small to be effectively reduced by technologies known to the Administrator."[20] The model technology used to promulgate the "low volume waste sources" NSPS standards was sedimentation or "surface impoundment," the same technology employed at Trimble.[21]

In 2005, EPA began a multi-year effort to study developments in treatment technology for steam electric power plants since the last revision to those ELGs.[22] The study included numerous site visits, on-site wastewater sampling, industry surveys, and

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[18] *NRDC v. EPA*, 437 F. Supp. 2d 1137, 1160-61 (C.D. Cal. 2006) (discussing legislative history).
[19] *See* 40 C.F.R. § 423.11(b) (as promulgated in 1982 at 47 Fed. Reg. 52,290-01, 52,304-52,305 (Nov. 19, 1982) (Apx. G)) ("low volume waste" defined to include wet scrubber air pollution control wastewater); 40 C.F.R. § 423.15(c) (as promulgated in 1982 at 47 Fed. Reg. at 52,307 (Apx. G)) ("low volume waste" standards).
[20] 47 Fed. Reg. 52,290-01, 52,303 (Nov. 19, 1982) (excerpts attached hereto at Apx. G).
[21] 78 Fed. Reg. 34,432-01, 34,459 (June 7, 2013) (excerpts attached hereto at Apx. H).
[22] EPA, Steam Elec. Power Generating Point Source Category: Final Detailed Study Report, Oct. 2009 (hereafter "2009 Study Report") at p. xii (available at https://www3.epa.gov/region1/npdes/merrimackstation/pdfs/ar/AR903.pdf) (last visited April 6, 2016).

other data collection efforts.[23] The Final Report of the EPA's study was published in October 2009.[24] Following this study, EPA began taking steps to revise the steam electric ELGs, which involved further study and additional site visits (68 site visits in 22 states from 2006-2013), industry surveys, and field sampling.[25]

On June 7, 2013, EPA published for comment proposals for revisions to the ELGs, including revised limits for FGD wastewaters. The preamble to the proposed revisions notes that "surface impoundments continue to be the predominant technology used to treat FGD wastewater," but observes that other treatment technologies had demonstrated better performance.[26] The EPA did not identify a single final set of proposed revisions to the ELGs, but instead identified several regulatory "options" based on different model treatment technologies, and requested comment on those options.[27]

EPA also recognized that planning for and implementing the required changes to comply with the new ELGs, including new limits on FGD wastewaters, would require several years for many plants. Accordingly, EPA stated in the proposed rule that implementation of new limits in renewal permits would be delayed until no earlier than July 1, 2017:

> [M]ost facilities need several years to plan, design, contract, and install major system modifications .... EPA recognizes that the proposed rule would require a significant amount of system design by engineering firms, equipment procurement from vendors, and installation by trained labor forces.... **[C]hanges to FGD wastewater treatment systems ... would constitute major system modifications requiring several years to accomplish for many plants.**[28]

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[23] *Id.* at pp. 2-1 – 2-2.
[24] *Id.* at p. xii.
[25] 78 Fed. Reg. at 34,444-34,445 (Apx. H).
[26] *Id.* at 34,458-34,460.
[27] *Id.* at 34,457-34,461.
[28] *Id.* at 34,480 (emphasis added).

The final revised steam electric ELGs were published in the Federal Register on November 3, 2015, and became effective on January 4, 2016.[29] The revised ELGs establish new BAT limits for arsenic, mercury, selenium, and nitrate/nitrite in FGD wastewaters. The treatment technology selected as the basis for the new BAT limits was chemical precipitation followed by biological treatment.[30] EPA did not establish numeric limits for every pollutant of concern ("POC") known to be present in FGD wastewaters, instead setting new limits on only 4 of the 31 known POCs in FGD wastewaters.[31] Among the pollutants not regulated, EPA identified five – ammonia, boron, chloride, cyanide, and total dissolved solids ("TDS") – for which no limits were set because the technology selected as the basis for the new BAT limits is not demonstrated to reliably treat them.[32]

Consistent with its statements about delayed implementation in the 2013 proposed revisions, EPA determined not to require compliance with the new BAT limits in FGD wastewaters for existing power plants until after November 1, 2018. The revised ELGs direct state permitting authorities to select a compliance date for achieving the new limits that is "as soon as possible" between November 1, 2018 and December 31, 2023.[33] FGD wastewaters generated before the compliance date are deemed "legacy FGD wastewaters." The revised ELGs establish separate BAT limits for these "legacy FGD

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[29] The revised ELGs and administrative preamble are found at 80 Fed. Reg. 67,838-01 (Nov. 3, 2015) (excerpts attached hereto at Apx. I), and codified at 40 C.F.R. Part 423. Administrative record materials related to the 2015 revised ELGs are found at http://www2.epa.gov/eg/steam-electric-power-generating-effluent-guidelines-2015-final-rule-documents (last visited April 6, 2016).

[30] 80 Fed. Reg. at 67,850 (Apx. I); EPA, Technical Development Document for Effluent Limitations Guidelines & Standards for Steam Elec. Generating Point Source Category ("2015 Dev. Doc") at 8-6, 11-2 (available at https://www.epa.gov/sites/production/files/2015-10/documents/steam-electric-tdd_10-21-15.pdf) (last visited, April 6, 2015) (excerpts attached hereto at Apx. K).

[31] 80 Fed. Reg. at 67,847-67,848 (Apx. I); 2015 Dev. Doc., *supra* note 30, at pp. 11-1 – 11-7 (Apx. K).

[32] 80 Fed. Reg. at 67,850 (Apx. I). *See also* 2015 Dev. Doc., *supra* note 30, at p. 11-2 (Apx. K).

[33] 80 Fed. Reg. 67,882 (Apx. I); 40 C.F.R. 423.13(g)(1)(i).

wastewaters," which are the same as the "low volume waste sources" limits contained in the 1982 ELGs.[34] Thus, EPA declared that the 1982 ELG limits on existing plants' FGD wastewaters will also be the BAT standard under the 2015 ELGs until the selected post-2018 compliance date.

**The 2010 Trimble Permit**

LG&E submitted its renewal application for the Trimble Permit in 2007. DOW submitted a draft Permit to EPA for review, and EPA offered several comments on matters unrelated to the present appeal. DOW made revisions to address EPA's comments and resubmitted the Permit for EPA review in August 2009. On September 9, 2009, **EPA advised DOW that it had no objection to the Permit.**[35] DOW issued the final Trimble Permit on April 1, 2010, after notice and comment and public hearing.

Consistent with the "new source" standards for "low volume waste sources" in the ELGs in force at the time (the 1982 ELGs), the Trimble Permit imposed numeric effluent limits for TSS, oil and grease, and pH on Trimble's FGD wastewaters, but did not prescribe technology-based limits on other pollutants in FGD wastewaters. DOW recognized that because FGD wastewaters were subject to the existing ELG for "low volume waste sources," there was no requirement to set additional ad hoc BPJ effluent limits for other pollutants. DOW also recognized that imposing new technology-based standards on an ad hoc basis when EPA was in the process of revising the ELGs could result in substantial wasted investment in treatment technologies that might prove to be incompatible with the technology basis eventually selected by EPA in the forthcoming

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[34] *See* 80 Fed. Reg. at 67,882-67,884 (Apx. I); 2015 Dev. Doc., *supra* note 30, at pp. 14-1 – 14-4, 14-9 – 14-12 (Apx. K).

[35] Administrative Record (hereinafter "AR"), Dkt. #30, Mem. in Supp. of Summary Judgment, Ex. A, Winkler Aff. at ¶16 & Attachment 9, NPDES Rev.

revised ELGs.[36]

Nevertheless, in anticipation of the new ELGs, the Permit includes monitoring requirements for Total Recoverable Metals, including arsenic, mercury, and selenium in FGD wastewaters, which would facilitate compliance with whatever new standards were adopted in the new national ELGs. DOW also included a re-opener clause that allows the Permit to be "modified, or alternatively revoked and reissued" when revised ELGs were finalized.[37] The Permit also includes a water-quality based Whole Effluent Toxicity ("WET") limit designed to further ensure that discharges do not adversely impact aquatic life in the Ohio River.

**Appeal of the Permit and proceedings below**

After the final Permit was issued in 2010, Appellees[38] initiated an administrative appeal with the Cabinet, arguing that because the 1982 ELGs in force at that time did not prescribe numeric limits on certain pollutants, including mercury, arsenic and selenium, DOW was required to impose additional case-by-case BPJ technology-based effluent limitations for those pollutants in Trimble's FGD wastewaters. The Cabinet upheld the Permit, concluding that because Trimble's FGD wastewaters were regulated by the existing nationwide ELGs, DOW was not required to conduct its own BPJ analysis to impose additional ad hoc limits.[39]

Appellees then filed a Petition for Review in Trimble Circuit Court. LG&E asked the Court to dismiss the Petition because KRS 224.10-470(1) provides the Franklin

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[36] AR, Dkt. #29, Beard Aff. at ¶¶ 8-14; AR, Dkt. #56, Beard Dep. at 146-47.
[37] AR, Dkt. #30, Mem. in Supp. of Summary Judgment, Ex. A, Winkler Aff. at ¶ 18 & Attachment 12, Trimble Permit at III-1; AR, Dkt. #29, Beard Aff. at ¶ 17; AR, Dkt. #56, Beard Dep. at 173-174.
[38] Kentucky Waterways Alliance, Sierra Club, Valley Watch, and Save the Valley are collectively referred to herein as "Appellees."
[39] AR, Dkt. #73, Secretary's Order (adopting Dkt. #71, Oct. 31, 2010 H.O. Order & Dkt. #52, Sept. 23, 2010 H.O. Summary Disposition Order) (orders collectively attached hereto as Apx. D).

Circuit Court with exclusive jurisdiction.[40] Rather than dismiss the Petition, the Trimble Circuit Court transferred the appeal to Franklin Circuit under the general venue statute.[41] LG&E moved the Franklin Circuit Court to dismiss for want of jurisdiction as untimely filed, but the Franklin Circuit Court denied the motion.[42]

The Franklin Circuit Court reversed the Cabinet's Order and struck down the Permit, concluding DOW was required to set additional technology-based BPJ limits on pollutants that were not specifically subject to numeric limits in the ELGs, particularly arsenic, mercury, and selenium.[43] The court acknowledged that the NSPS standards in the 1982 ELGs set effluent limits applicable to Trimble's FGD wastewaters, but concluded it was unreasonable to refrain from imposing stricter standards in reliance on the ELGs, given that the ELGs had not been revised since 1982.

In a 2-1 decision, the Court of Appeals affirmed, holding that the Cabinet was required to perform an ad hoc BPJ analysis to set supplemental effluent limits for pollutants such as mercury, arsenic, and selenium, which were not specifically regulated in the applicable ELG.[44] Judge Maze dissented, concluding the Majority's interpretation of the CWA was "in contravention of the regulatory scheme present in the Act which is essential to the Clean Water Act's clear goal of national uniformity...."[45] LG&E and the Cabinet both filed timely motions for discretionary review of the Court of Appeals decision, and this Court accepted review.

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[40] R. 85-100, LG&E's Resp. to Petitioners Mot. for Declaratory Ruling on Venue.
[41] R. 1-2, Nov. 2, 2011, Trimble Circuit Court Order (attached hereto as Apx. F).
[42] R. 211-23 & 224-25, LG&E Mot. to Set Aside Transfer Order and Renewed Mot. to Dismiss; R. 278-81, July 5, 2012 Franklin Circuit Court Order Denying Motion to Dismiss (attached hereto as Apx. E).
[43] R. 555-69, Sept. 10, 2013 Opinion & Order (attached hereto as Apx. C).
[44] May 29, 2015 Opinion (hereinafter "Opinion") (attached hereto as Apx. A). The Majority Opinion also held that KRS 224.10-470(1) related to venue, not jurisdiction, and that the Trimble Circuit Court's transfer order was proper. *Id.* at 7-8.
[45] *Id.* at 20.

## ARGUMENT

The plain language of the CWA states that permitting authorities are not required to perform a BPJ analysis to set case-by-case effluent limits for wastewaters that are already subject to a nationwide ELG. Federal courts construing the CWA have uniformly agreed that no BPJ limits are required once an applicable ELG is in place. Thus, the Cabinet properly concluded it was not required to impose additional BPJ limits on Trimble's FGD wastewaters, because these wastewaters were already subject to effluent limits under the steam electric ELGs in force at the time the Permit was issued. The Permit should therefore have been upheld.

The Court of Appeals' Majority decision nevertheless disregarded the CWA's plain language, and instead held that whenever an ELG does not prescribe a specific numeric limit for **every** pollutant contained in a facility's wastewaters, the Cabinet has a mandatory obligation to perform an ad hoc BPJ study to determine the best technologies for controlling each such pollutant, and to prescribe numeric discharge limitations for each such pollutant based on the technology selected. No other court has ever endorsed this interpretation, and courts in at least two states – Illinois and Tennessee – have expressly rejected it in the specific context of wastewaters from power plant air pollution control systems. The Majority's interpretation imposes impossible burdens on state permitting authorities and casts a cloud of uncertainty over every CWA permit that applies a national ELG, in every industry, because ELGs **never** prescribe numeric limits for every pollutant in a given wastestream. Moreover, the Majority's interpretation of the CWA is contrary to the Act's express goal of promoting national uniformity of technology-based regulation, and threatens to create the very state-by-state patchwork of

uneven and inconsistent regulation that the CWA sought to eliminate.

The Majority Opinion also disregards this Court's decisions mandating deference to an agency's permissible construction of the statutes and regulations it is charged with implementing, and fails to follow the analytic framework prescribed by those decisions.

Moreover, the Majority Opinion is in direct conflict with the EPA's 2015 revisions to the steam electric ELGs, which expressly state that the 1982 ELGs' effluent limitations for FGD wastewaters shall continue to apply until a date on or after November 1, 2018, selected by state permitting authorities, and that new technology-based effluent limits shall not be imposed on arsenic, mercury, and selenium in FGD wastewaters until after that date.

Finally, the Court of Appeals' decision should be reversed for the additional reason that the Appellees failed to comply with the jurisdictional statutory requirements to perfect their appeal of the Trimble Permit, and thus the Franklin Circuit Court lacked jurisdiction to invalidate the Permit. This Court has repeatedly held that all statutory requirements for administrative appeals are jurisdictional in nature, and require strict compliance. Thus, Appellees' failure to comply with KRS 224.10-470, which gives Franklin Circuit Court exclusive jurisdiction over appeals of KPDES permitting orders, was a jurisdictional defect, and the Trimble Circuit Court lacked the authority to cure the defect by transferring the case to Franklin Circuit under the venue statute. The Majority's effort to avoid this result by unilaterally declaring KRS 224.10-470 to be non-jurisdictional is squarely at odds with this Court's repeated affirmation of the doctrine of strict compliance with statutory requirements in administrative appeals, and should therefore be reversed.

## I. This Court reviews the circuit court's decision *de novo*, and the Cabinet's decision upholding DOW's issuance of the Trimble Permit is entitled to substantial deference by the courts.

In an administrative appeal such as this one, this Court reviews the circuit court's decision *de novo*, applying the same standards as the circuit court to review of the Cabinet's orders. *500 Assocs., Inc. v. Natural Res. & Envtl. Prot. Cabinet*, 204 S.W.3d 121, 131 (Ky. App. 2006). "The circuit court's role as an appellate court is to review the administrative decision, not to reinterpret or to reconsider the merits of the claim, nor to substitute its judgment for that of the agency as to the weight of the evidence." *Id.* "The judicial standard of review of an agency's decision therefore is largely deferential." *Louisville/Jefferson Metro Gov't v. TDC Group, LLC*, 283 S.W.3d 657, 663 (Ky. 2009).

When an agency's decision relates to technical matters within its particular field of expertise, "an extra measure of deference is warranted." *EarthLink, Inc. v. F.C.C.*, 462 F.3d 1, 9 (D.C. Cir. 2006). Such judgments are reviewed only for "minimum standards of rationality" – "whether the agency action bears a rational relationship to the statutory purposes" and is supported by substantial evidence. *La. Envtl. Action Network v. EPA*, 382 F.3d 575, 582 (5th Cir. 2004) (quotation omitted).

Moreover, an agency's interpretation of the statutes and regulations it implements is entitled to substantial deference. *Morgan v. Natural Res. and Envtl. Prot. Cabinet*, 6 S.W.3d 833, 842 (Ky. App. 1999). "If a statute is ambiguous, the courts grant deference to **any permissible construction** of that statute by the administrative agency charged with implementing it," whether or not the Court would arrive at the same construction *de novo*. *Pub. Serv. Comm'n of Ky. v. Commonwealth*, 320 S.W.3d 660, 668 (Ky. 2010) (emphasis added). The Cabinet, which is charged with implementing and administering

the KPDES program, is entitled to such deference in its interpretation of the statutes and regulations governing that program. *Commonwealth, Energy & Env't Cabinet v. Sharp*, 2012 WL 1889307, at *11 (Ky. App. May 25, 2012) (unpublished, copy attached as Apx. P) (reversing Franklin Circuit Court for "substituting its own preferred interpretation of the statute over that of the Secretary, despite the fact that the agency's interpretation was ... reasonable...").

## II. The Cabinet correctly determined that no additional case-by-case BPJ effluent limitations were required for Trimble's FGD wastestream.

The Cabinet determined that DOW was not required to impose ad hoc case-by-case BPJ effluent limitations on FGD wastewaters because, under the CWA, states are not required to promulgate BPJ limitations for waste streams that are already covered by nationwide ELGs promulgated by EPA. This is not only a reasonable interpretation of the CWA, it is the interpretation courts have repeatedly held is compelled by the plain language of the Act. The Majority Opinion's rejection of the Cabinet's reasonable statutory interpretation is error, and should be reversed.[46]

### A. As a matter of law, the CWA does not require case-by-case BPJ limits where a nationwide ELG applies.

The CWA is clear that states are not required to perform a BPJ analysis to set case-by-case effluent limits for wastewaters that are already subject to a nationwide ELG. Section 402(a)(1) of the CWA expressly states that BPJ limits are to be imposed only "prior to" EPA's promulgation of an applicable ELG:

> the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants ... upon condition that such discharge will meet **either** (A) all applicable requirements under [nationwide ELGs], **or** (B) **prior to the taking of**

[46] This issue was properly preserved for appeal. *See* LG&E Court of Appeals Appellant's Br. at 11-22; R. 375-505, Joint Resp. Br. of Respondents at 12-20.

> **necessary implementing actions relating to all such requirements** [for promulgating ELGs], such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

33 U.S.C. § 1342(a)(1) (emphasis added). Thus, the imposition of ad hoc BPJ limits is required only "[i]f **no** national standards have been promulgated for a particular category of point sources." *NRDC v. EPA*, 822 F.2d 104, 111 (D.C. Cir. 1987) (emphasis added).[47]

Courts have long recognized that "Section 402(a)(1) acts ... to **preclude the establishment of BPJ permit limits once applicable effluent guidelines are in place**...." *NRDC v. EPA*, 859 F.2d 156, 200 (D.C. Cir. 1988) (emphasis added). That conclusion is supported by the legislative history of Section 402(a)(1), which demonstrates that Congress included the provision for BPJ permitting only as an interim measure to allow reasonable regulations to be implemented in the time period between enactment of the 1972 amendments that first adopted the CWA's permitting and technology-based regulatory regime, and EPA's promulgation of national ELGs for a particular industrial category. *NRDC v. EPA*, 437 F. Supp. 2d 1137, 1160-61 (C.D. Cal. 2006) (discussing legislative history). BPJ permitting was not intended to be used by states on an ongoing basis to modify and supplement EPA's nationwide ELGs once they were promulgated. *Id.* Thus, "[l]ike the statutory language itself, ... [the legislative history] tells us that ... the purpose of these ad hoc limits is to bridge the gap between promulgation of the Act and adoption of effluent guidelines." *NRDC*, 859 F.2d at 200.

Accordingly, once national ELGs are in place for a particular industry category, state permitting authorities are to cease imposition of ad hoc technology based limits and uniformly apply the limits reflected in the ELGs to all facilities within that category,

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[47] The term "point source" refers to "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, [or] conduit ... from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

consistent with the CWA's goal of national uniformity:

> [T]he issuance of permits not subject to ELGs and NSPSs was to be only an interim measure pending the promulgation of guidelines, limitations, and standards mandated elsewhere in the Act. Once national limitations are established, state permit programs are required to apply them in order to achieve the statutory goal of uniform effluent limitations for "similar point sources with similar characteristics." **We know of no legal authority stating that the practice of issuing permits based on "best professional judgment" was to be ongoing.**

*NRDC*, 437 F. Supp. 2d at 1160 (emphasis added).[48]

Here, there is no question that the ELGs in force when the Permit was issued prescribed effluent limitations applicable to Trimble's FGD wastewaters. It is undisputed that Trimble was subject to the ELGs' "new source" effluent limits for "low volume waste sources," which were expressly defined in the 1982 ELGs to include FGD wastewaters. 40 C.F.R. § 423.11(b) (as promulgated in 1982 at 47 Fed. Reg. at 52,304-52,305 (Apx. G)). Those "new source" standards specifically prescribed numeric effluent limitations applicable to Trimble's FGD wastewaters. 40 C.F.R. § 423.15(c) (as promulgated in 1982 at 47 Fed. Reg. at 52,307 (Apx. G)).[49] Indeed, in the Development Document for the 2013 proposed revisions to the ELGs, EPA acknowledged that the existing "Steam Electric ELGs ... include limitation for ... Low-volume waste sources, including but not limited to, wastewaters from wet scrubber air pollution control systems...."[50] EPA specifically considered the pollutants at issue here – mercury, arsenic, and selenium – when establishing the "low volume waste source" limits, and chose not to set limits on those pollutants because they were "present in amounts too small to be

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[48] *See also, e.g., Texas Oil & Gas Ass'n v. EPA*, 161 F. 3d 923, 928-29 (5th Cir. 1998); *NRDC v. Train*, 510 F.2d 692, 709-10 (D.C. Cir. 1974).

[49] *See supra* note 19, and accompanying text.

[50] EPA, Technical Development Doc. for Proposed Effluent Limitations Guidelines and Standards for Steam Elec. Power Generating Point Source Category, April 2013 (hereafter "2013 Dev. Doc.") at 1-5 (available at https://www3.epa.gov/region1/npdes/merrimackstation/pdfs/ar/AR904.pdf )(last visited April 6, 2016) (excerpts attached hereto as Apx. J).

effectively reduced" by the selected treatment technology. 47 Fed. Reg. at 52,303-52,304 (Apx. G). Because Trimble's FGD wastewaters were subject to a uniform national ELG, under the plain language of Section 402(a) of the CWA, no ad hoc, case-by-case BPJ limitations were required, as a matter of law. *NRDC*, 859 F.2d at 200.

The Cabinet's interpretation is further supported by the fact that EPA reviewed the Trimble Permit in 2009, and raised no objection to the final Permit's use of the 1982 "new source" standards for Trimble's FGD wastewaters. *See NRDC v. Pollution Control Bd.*, 37 N.E.3d 407, 414 (Ill. App. Ct. 2015) (by not objecting to draft permit, "USEPA implicitly agreed with the IEPA's decision to not develop and impose a case-by-case best-professional-judgment-based TBEL for the Havana facility scrubber/ACI waste stream").

Moreover, courts in other states that have addressed this precise issue have reached the same conclusion as the Cabinet. The Illinois Court of Appeals, for example, expressly rejected the reasoning of the Court of Appeals' Opinion in this case, and concluded that no supplemental BPJ limits for mercury or other pollutants in a power plant's scrubber wastewaters were required in a permit issued prior to the most recent ELG revision, because the 1982 ELGs applied to those discharges. *Pollution Control Bd.*, 37 N.E.3d at 415. The court explained that "contrary to the finding in *Louisville Gas & Electric Co. v. Kentucky Waterways Alliance*....[,] [b]ecause the Havana facility's scrubber/ACI waste stream was subject to the 1982 ELG, the Board did not err in finding the IEPA was not required to adopt TBELs on a case-by-case basis." *Id.*

Likewise, the Tennessee Chancery Court held that supplemental BPJ limits for scrubber wastewaters were not required to be included in a 2010 power plant permit, explaining that "EPA's 1982 ELGs at 40 C.F.R. Part 423 govern toxic and

nonconventional pollutants, including metals such as arsenic, mercury, and selenium, because the Preamble to those ELGs demonstrates that EPA recognized the presence of those pollutants, that power was given to the EPA Administrator to characterize those pollutants, and that the Administrator did so and decided not to set national numeric limitations for those particular pollutants." *Tenn. Clean Water Network v. Tenn. Bd. of Water Quality, Oil & Gas*, No. 13-1742-I, at p. 2 (Tenn. Chanc. Ct. Feb. 25, 2015) (attached hereto as Apx. N). *See also id.*, Appendix at pp. 8-10, 31-33; *Tenn. Clean Water Network v. Tenn. Bd. of Water Quality, Oil & Gas*, No. 14-1577-I, at pp. 2-3 (Tenn. Chanc. Ct. Feb. 25, 2015) (attached hereto as Apx. O).

Thus, the Cabinet's interpretation of the CWA is consistent with the overwhelming weight of federal case law interpreting the Act's provisions relating to ELGs and BPJ permitting, as well as the only other judicial decisions applying those provisions to the specific question of scrubber wastewaters in power plants. In contrast, neither the circuit court, the Court of Appeals, nor the Appellees have ever identified a single decision that adopts their interpretation of the Act. The circuit court quoted language from *NRDC v. EPA's* background discussion about states' duty to perform BPJ analyses in certain circumstances, 859 F.2d at 183, but the language quoted by the court was discussing circumstances in which there are **no ELGs at all** for a particular industrial category. Later in the same opinion, the *NRDC* court confirmed that "BPJ limits are no longer to be created once national guidelines are in place...." *Id.* at 200.

The Majority Opinion acknowledged that the 1982 ELG prescribed effluent limits applicable to Trimble's FGD wastewaters, noting that "[a]t the time the Cabinet issued its permit to LG&E, the EPA's most recent ELG regulating 'low volume waste' from wet

scrubbers .... established performance standards and limits on" Trimble's FGD wastewaters. (Opinion at 11-12.) The Majority also recognized that "[i]t is uncontested among the parties that a case-by-case, best professional judgment analysis is not required under the Act when a nationwide ELG sets limits for a category of dischargers." (*Id.* at 12.) Those two concessions together compel the conclusion that a BPJ was not required under the plain language of the CWA. The Majority's conclusion to the contrary is irreconcilable with the Act's express directives.

**B. The Majority Opinion's reliance on 40 C.F.R. § 125.3 is misplaced.**

The Majority Opinion does not discuss the controlling language in Section 402(a)(1) of the Clean Water Act itself, or the myriad federal authorities that have interpreted this language to mean that BPJ limits are no longer required once a national ELG for a particular wastestream is in place. Instead, the Majority, like the circuit court, based its holding solely on one of the Act's implementing regulations, 40 C.F.R. § 125.3(c), which states:

> Technology-based treatment requirements may be imposed through one of the following three methods:
>
> (1) Application of EPA-promulgated effluent limitations developed under section 304 of the Act to dischargers by category or subcategory.....
>
> (2) On a case-by-case basis under section 402(a)(1) of the Act, to the extent that EPA-promulgated effluent limitations are inapplicable....
>
> (3) Through a combination of the methods .... Where promulgated effluent limitations guidelines only apply to certain aspects of the discharger's operation, or to certain pollutants, other aspects or activities are subject to regulation on a case-by-case basis in order to carry out the provisions of the Act.

The Majority incorrectly interpreted subpart (3) of this regulation to require that state permitting authorities perform a BPJ analysis and prescribe supplemental effluent

limits any time a waste stream contains any "pollutants" that are not specifically subject to a numeric effluent limit in an ELG. Thus, the Majority concluded that because the 1982 ELGs "only applied to 'certain pollutants'" in FGD wastewaters, and did not prescribe numeric limits on all pollutants in those wastewaters, the Cabinet was "required" to prescribe case-by-case BPJ limits for those other pollutants. (Opinion at 14.)

There are a number of flaws in the Majority's analysis. First, the Majority interprets the regulation in a way that conflicts with the CWA itself, and with EPA's own guidance to state permitting authorities, which instructs that BPJ limits are not to be established for pollutants that the EPA considered in promulgating ELGs, even if no specific limitations were prescribed. Second, the Majority imposes an impossible burden on state permitting authorities, since EPA itself has recognized that it is impracticable to regulate every pollutant in a given wastestream. Third, the Majority's conclusion is contrary to the CWA's express goal of national uniformity in technology-based limits. Fourth, the Majority's interpretation is inconsistent with the CWA's allocation of responsibility between the EPA and the states.

**1. The Majority's interpretation of 40 C.F.R. § 125.3(c) conflicts with the express language of the CWA and EPA guidance interpreting the regulation by requiring BPJ limits for pollutants EPA specifically considered when promulgating the 1982 ELGs.**

Consistent with the text of the CWA and the legislative purpose underlying the BPJ permitting provisions, the Cabinet correctly interprets 40 C.F.R. § 125.3(c) to mean that if EPA has promulgated an ELG applicable to a waste stream, like FGD wastewaters, and specifically considered the pollutants at issue but declined to prescribe numeric

limitations for them, the Cabinet may apply the ELG limitations as written pursuant to subparagraph (1) without additional BPJ limits for those pollutants. Judge Maze, in dissent, agreed: "[t]he Cabinet was correct to apply the 1982 effluent guideline pursuant to 40 C.F.R. § 125.3(c)(1) instead of employing a case-by-case analysis under the other subsections of the same regulation." (Opinion at 20 (Maze, J., dissenting).)

That interpretation is consistent with the text of 40 C.F.R. § 125.3(c), which recognizes that the Cabinet may choose from among the three methods set forth in the regulation. Thus, 40 C.F.R. § 125.3 recognizes that technology-based-limits "*may* be imposed" by one of three methods, including the method prescribed in subparagraph (1) – "[a]pplication of EPA-promulgated effluent limitations developed under section 304 of the Act to dischargers by category or subcategory." The Majority misconstrued the Cabinet's interpretation "to mean that the Cabinet has the discretion to employ one of the three methods or none of them." (Opinion at 14.) But the Cabinet has never asserted that it has the option to apply "none" of the methods in 40 C.F.R. § 125.3(c). The Cabinet merely held – correctly – that it could opt to follow the first method prescribed in that section: application of the ELG as written.

The Cabinet's interpretation, moreover, is the one that best harmonizes the regulation with the language of the CWA itself. As noted above, the language of the CWA expressly dictates that BPJ limits are not required once an applicable ELG is in place. The Majority's interpretation is squarely at odds with the statutory language, insofar as the Majority makes imposition of ad hoc BPJ limits on a pollutant mandatory, even when EPA has promulgated an ELG for the wastestream and determined not to impose limits on that pollutant. It is axiomatic that a regulation should not be applied or

interpreted in a way that violates the express language of the statute it implements. *See K-Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988); *Revenue Cabinet v. Joy Techs.*, 838 S.W.2d 406, 409 (Ky. App. 1992).

Consequently, as between the Cabinet's interpretation, which construes the regulation in a manner consistent with the language of Section 402(a), and the Majority's interpretation, which renders the regulation in conflict with that statutory language, the Cabinet's interpretation should prevail. *Commonwealth, Cabinet for Health Servs. v. Family Home Health Care, Inc.*, 98 S.W.3d 524, 527 (Ky. App. 2003) (court should defer to agency interpretation of regulations "as long as that interpretation is compatible and consistent with the statute" and not arbitrary).

Additionally, the Cabinet's interpretation is consistent with EPA's own guidance to state permitting authorities that BPJ limits are not to be established for pollutants that EPA considered in promulgating ELGs, but chose not to prescribe specific numeric limits. EPA's current NPDES Permit Writer's Manual states that "[e]ffluent guidelines are not always established for every pollutant present in a point source discharge,"[51] and instructs permit writers to "make sure that the pollutant … was not **considered** by EPA when the Agency developed the effluent guidelines" before imposing any BPJ limits.[52] Similarly, the version in effect when the Trimble Permit was issued expressly stated "BPJ-based limits are not required for pollutants that were **considered** by EPA for regulation under the effluent guidelines, but for which EPA determined that no ELG was

[51] 2010 NPDES Permit Writers Manual, *supra* note 13, at p. 5-18 (Apx. L).
[52] *Id.* at p. 5-46.

necessary."[53]

Here, the pollutants identified by the circuit court were considered by EPA in formulating the 1982 ELGs. Appendix A to the Preamble for the 1982 ELGs identified 34 toxic pollutants in the "Low Volume Wastewaters" category – including arsenic, mercury, and selenium – that were "excluded from national regulation because they are present in amounts too small to be effectively reduced by technologies known to the Administrator." 47 Fed. Reg. at 52,303-52,304 (Apx. G).

The Franklin Circuit Court misread this statement to say that these pollutants were "undetectable to the Administrator at that time."[54] That is not what it says. It says the pollutants "are present" – *i.e.*, were detected – but are present in quantities too small for effective reduction by the treatment technologies selected by EPA as the basis for the ELGs. Indeed, Appendix A included a list of five *different* pollutants "excluded from national regulation because they were *not detected*," demonstrating that EPA distinguished between pollutants that are "not detected" and those that are detected, but not in quantities that can be effectively reduced. 47 Fed. Reg. at 52,303 (emphasis added). Thus, the pollutants at issue in this appeal were considered by EPA, and are not subject to BPJ limits.

Other courts have agreed. The Illinois Court of Appeals rejected a similar suit seeking to require BPJ limits for mercury in power plant wet scrubber wastewaters because "[t]he 1982 ELG shows mercury was among the toxic pollutants considered when determining the appropriate effluent limitations for low volume waste sources," and

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[53] EPA, NPDES Permit Writers Manual, December 1996 ("1996 NPDES Permit Writers Manual") at p. 69 (available at http://nepis.epa.gov/Exe/ZyPDF.cgi/20004BM3.PDF?Dockey=20004BM3.PDF) (emphasis added) (last visited April 6, 2016) (excerpts attached hereto as Apx. M).
[54] R. 555-69, Sept. 10, 2013 Opinion and Order at 9.

"[a]s the USEPA considered these pollutants, the 2010 USEPA permit manual directs a permit writer to refrain from imposing best-professional-judgment limitations and instead use the applicable ELG." *NRDC*, 37 N.E.3d at 414. The Tennessee Chancery Court similarly concluded that supplemental BPJ limits for scrubber wastewaters were not required because "the preamble of ... the 1982 regulation does show that EPA did not just recognize the presence of those metals, but actually made a decision" not to prescribe numeric limits. *Tenn. Clean Water Network*, No. 13-1742-I, at Appendix p. 31 (Apx. N).

The Majority agreed with LG&E and the Cabinet that the Franklin Circuit Court's reasoning – that arsenic, mercury, and selenium were "not detected" at the time of the 1982 revision – was "strained," but the Majority nonetheless "agree[d] with the circuit court that the hearing officer attached a disproportionate amount of weight to the Permit Writer's Manual." (Opinion at 13.)

The Majority's criticism of the Permit Writer's Manual is wholly without basis. The Permit Writer's Manual is the primary interpretive document EPA provides to state permitting authorities to aid them in their administration of the NPDES permit system. Accordingly, courts have routinely relied on the Manual when construing the CWA and its implementing regulations. *E.g., Catskills Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 451 F.3d 77, 85 (2nd Cir. 2006) (relying on Permit Writer's Manual in interpreting 40 C.F.R. § 123.5); *Am. Canoe Ass'n v. D.C. Water & Sewer Auth.*, 306 F. Supp. 2d 30 (D.D.C. 2004); *NRDC*, 37 N.E.3d at 414.

The Majority's only reason for rejecting reliance on the Permit Writer's Manual was the Majority's belief that the Manual's instructions were incompatible with the CWA's general statement of purpose "to restore and maintain the chemical, physical, and

biological integrity of the Nation's waters" through the development of "technology necessary to eliminate the discharge of pollutants...." (Opinion at 14 (quoting 33 U.S.C. § 1251(a).)

That was error. Courts have consistently held that the CWA's generalized goal to "restore and maintain" the nation's waters in 33 U.S.C. § 1251(a) cannot be used to override or ignore specific substantive provisions of the Act, or legislative history informing the meaning of those specific provisions. *United States v. Plaza Health Laboratories, Inc.*, 3 F.3d 643 (2nd Cir. 1993) ("Caution is always advisable in relying on a general declaration of purpose to alter the apparent meaning of a specific provision."); *Nat'l Wildlife Fed'n v. Gorsuch*, 893 F.2d 156 (D.C. Cir. 1982).

Thus, the Majority erred in relying on the CWA's general statement of purpose to justify its disregard of the express language of Section 402(a), and the specific legislative history of that section, instructing that BPJ limits are not required once EPA has promulgated a nationwide ELG applicable to the relevant waste stream. It was also error to reject the Permit Writer Manual's guidance about how to harmonize 40 C.F.R. § 125.3(c) with the language of Section 402(a).

Relying on the statute, and the EPA's guidance, the Cabinet correctly concluded that because EPA had specifically considered whether to set limits for arsenic, mercury, and selenium in the 1982 ELGs, the Cabinet was not required to make its own independent determination on that point using case-by-case BPJ analysis. That is a reasonable interpretation of the CWA's implementing regulations, and the one most consistent with the language of the Act itself.[55]

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[55] Unlike the circuit court, the Court of Appeals did not place any reliance on the non-binding "interim guidance" memorandum issued by James Hanlon of EPA's Office of Wastewater Management on June 7,

### 2. The Majority's interpretation of 40 C.F.R. § 125.3(c) overlooks the fact that ELGs never establish numeric limits for every pollutant in a waste stream, and thus imposes an impossible burden on state permitting authorities, calls into question the validity of every KPDES permit that applies a nationwide ELG, and renders subsection (1) of the regulation a nullity.

The Majority Opinion is premised on the unprecedented conclusion that whenever a national ELG fails to prescribe numeric limitations for **every** pollutant in a particular wastestream, the Cabinet has a mandatory obligation under the CWA to conduct a BPJ study to select the appropriate technology for controlling each such pollutant, and to prescribe in every KPDES permit additional numeric effluent limitations for each such pollutant based on the technology selected. In addition to being contrary to the express language of the CWA, that conclusion requires state permitting authorities to do something the United States EPA – with its vastly greater resources – has concluded is impossible. What is more, the Majority's interpretation calls into question the validity of every KPDES permit that applies a national ELG, since no ELGs prescribe numeric limits for every pollutant in a waste stream.

It is well established that nationwide ELGs **never** prescribe numeric limits for

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2010 (the "Hanlon Memo") – several months after DOW issued the final Trimble Permit. (AR, Dkt. #50, Memo. from James A. Hanlon, June 7, 2010.) The Hanlon Memo discussed the October 2009 steam electric industry study's findings about settlement ponds, and expressed the author's view that prospectively, states should use their BPJ permitting authority to impose additional limitations on FGD waters in "NPDES permits issued between now and the effective date" of revised ELGs. However, the Memo expressly states "this guidance document is not legally enforceable and does not confer legal rights or impose legal obligations upon any member of the public, EPA, states, or any other agency." (*Id.*, Attachment A, p. 6.) Regardless, on its own terms, the Hanlon Memo did not apply to permits, like the Trimble Permit, issued before the Memo was written. *Arkema Inc. v. EPA*, 618 F.3d 1, 37 (D.C. Cir. 2010) (subsequently issued agency guidance cannot be considered in evaluating prior transactions). The Hanlon Memo also had no application to the Trimble Permit because it focused on the absence of limits on FGD wastewaters in the steam electric BAT standards, whereas Trimble was governed by the "new source" standards, which did include effluent limitations for FGD wastewaters. 40 C.F.R. § 423.15. In any event, Kentucky law forbids the Cabinet from modifying promulgated regulations based on internal memoranda or policy statements like the Hanlon Memo. KRS 13A.130; *Kerr v. Ky. State Bd. of Reg. for Prof. Eng'rs & Land Surveyors*, 797 S.W.2d 714, 717 (Ky. App. 1990). Federal courts also have invalidated the use of informal guidance that has the "practical effect" of creating new legal obligations. *Iowa League of Cities v. EPA*, 711 F.3d 844 (8th Cir. 2013).

every pollutant in a particular waste stream because, as EPA has found, "it is **impossible** to identify and rationally limit every chemical or compound present in a discharge of pollutants." *Sierra Club v. ICG Hazard, LLC*, 781 F.3d 281, 287-88 (6th Cir. 2015) (quoting *In re Ketchikan Pulp Co.*, 7 E.A.D. 605, 1998 WL 284964, at *9 (E.P.A. May 15, 1998)). *See also Atlantic States Legal Found. v. Eastman Kodak Co.*, 12 F.3d 353, 357 (2d Cir. 1993). "Consequently, the Agency has determined that the goals of the CWA may be more effectively achieved by focusing on the chief pollutants and waste streams established in effluent guidelines ... rather than by attempting to identify the hundreds or thousands of pollutants potentially present in permittees' waste streams." *ICG Hazard, LLC*, 781 F.3d at 287-88. This is true for both "conventional" and "toxic" pollutants. "EPA ... frequently does not impose specific effluent guidelines for certain pollutants, **especially in regulating toxics**...." *NRDC*, 822 F.2d at 125 (emphasis added). *See also Reynolds Metals Co. v. EPA*, 760 F.2d 549, 557 (4th Cir. 1985) (noting various toxics that were not subjected to numeric limits in ELGs "because the Agency felt that it would be removed by the oil and grease removal systems mandated by BPT").

The Majority Opinion does not address this point and, as a result, imposes a new duty on the Cabinet to do something that EPA itself has determined is "impossible." Under the Majority Opinion, every time the Cabinet issues a permit, it would have to conduct a BPJ analysis of technologies available to treat any pollutants not regulated in an applicable ELG, select a treatment technology, and set numeric effluent limits for each pollutant not otherwise regulated based on the reductions achievable using the selected technology. Moreover, the Cabinet would be required to perform this analysis for the very pollutants that EPA had determined were not amenable to numeric limits.

For example, in determining whether to set a limit for a given pollutant, EPA considers, among other things, "whether a pollutant is present in the process wastewater at treatable concentrations and whether the model technology for effluent guidelines effectively treats the pollutant."[56] Indeed, that is precisely the reason cited by EPA in the 1982 ELGs for not setting limits on arsenic, mercury, and selenium in FGD wastewaters. 47 Fed. Reg. at 52,304 (Apx. G). The Majority, however, holds that even where EPA determines that the appropriate treatment technology it selects after years of study cannot be used as a basis for a technology-based effluent limit on a particular pollutant, the Cabinet nonetheless has a mandatory duty to go beyond EPA's analysis and perform its own BPJ analysis of treatment technologies to establish numeric technology based limits for that pollutant. That conclusion is untenable.

Indeed, even the EPA's 2015 revision of the steam electric ELG does not establish numeric limits for every pollutant known to be present in FGD wastewaters. Instead, the revised ELGs set new limits on only 4 of the 31 known pollutants of concern ("POCs") in FGD wastewaters. 80 Fed. Reg. at 67,847-67,848 (Apx. I).[57] EPA identified five POCs – ammonia, boron, chloride, cyanide, and total dissolved solids ("TDS") – for which no limits are set in the 2015 ELGs because the technology selected as the basis for the new BAT limits is not demonstrated to reliably treat them.[58] Under the Majority's Opinion, however, the Cabinet would nonetheless be required to perform a BPJ analysis to set numeric limitations for all of these pollutants, despite EPA's conclusion just last year – after nearly a decade of study – that the best available technology does not effectively treat them.

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[56] 2010 NPDES Permit Writers Manual, *supra* note 13, at p. 5-18 (Apx. L).
[57] *See also* 2015 Dev. Doc., *supra* note 30, at pp. 11-1 – 11-7 (Apx. K).
[58] 2015 Dev. Doc., *supra* note 30, at p. 11-2. *See also* 80 Fed. Reg. at 67,848 (Apx. I).

The implications of the Majority Opinion extend far beyond the present controversy. Under the Majority Opinion, arguably any permit in any industry that applies national ELGs is invalid unless it contains separate case-by-case BPJ numeric limits, potentially requiring an enormous undertaking by states to study and prescribe new technology-based BPJ limits for every pollutant EPA chose not to regulate in the ELG every time such a permit is renewed. The Majority Opinion thus casts a cloud of uncertainty over all Kentucky businesses currently operating under such a permit.

The fact that ELGs never prescribe effluent limits for every pollutant in a particular waste stream also means that the Majority's interpretation of 40 C.F.R. § 125.3(c) renders subsection (1) of that provision a nullity. The Majority concludes that 40 C.F.R. § 125.3(c)(3) imposes a mandatory obligation to impose additional BPJ limits whenever an ELG does not specify numeric effluent limits for every pollutant in a waste stream. But under that view, subparagraph (1) of the regulation – which authorizes a state permitting authority to apply the ELG as written – would **never** apply. Under the Majority's interpretation, the Cabinet could never proceed under subparagraph (1), and would always have to proceed under subparagraph (3) by supplementing the ELG limits with BPJ limits to fill in the gaps for other pollutants in the waste stream, because every ELG leaves some pollutants unregulated. The Majority's interpretation thus violates the cardinal principle of interpretation that a law should never be construed in a way that renders some provisions meaningless, *Lexington-Fayette Urban County Gov't v. Johnson*, 280 S.W.3d 31, 34 (Ky. 2009), whereas the Cabinet's interpretation is the only one that gives effect to all provisions of §125.3(c).

### 3. The Majority Opinion is contrary to the CWA's goal of national uniformity of technology-based limits.

The Majority's interpretation is also at odds with the CWA's clear legislative goal of promoting national uniformity of technology-based standards. The CWA's legislative history makes clear that Congress intended ELGs to establish **uniform** national standards in order to minimize state-by-state inconsistencies and "forum shopping" by industrial dischargers. *E.g.*, *NRDC v. Costle*, 568 F.2d 1369, 1378 (D.C. Cir. 1977). Indeed, the "**primary** purpose of the effluent limitations and guidelines was to provide uniformity." *Id.* (emphasis added).

The CWA advances this goal by Section 402(a)'s requirement that state permitting authorities adhere to the effluent limits set forth in nationwide ELGs once they are promulgated for a particular industry category. "Once national limitations are established, state permit programs are required to apply them in order to achieve the statutory goal of uniform effluent limitations for 'similar point sources with similar characteristics.'" *NRDC*, 437 F. Supp. 2d at 1160 (emphasis added). *See also, e.g., Texas Oil & Gas Ass'n v. EPA*, 161 F.3d 923, 928-29 (5th Cir. 1998); *NRDC v. Train*, 510 F.2d 692, 709-10 (D.C. Cir. 1974).

"[C]ontinu[ing] to rely upon the issuance of [BPJ] permits with varying standards[] is thus at odds with the expressly stated goals of the legislation." *NRDC*, 437 F. Supp.2d at 1160. By their very nature, BPJ effluent limitations are not uniform. They are ad hoc, site-specific, and case-by-case. *Id.* Thus, the Majority's interpretation would replace the CWA's uniform effluent guidelines with a patchwork of state-determined ad hoc limitations, since the Majority would require state permitting authorities to overlay every ELG with case-by-case BPJ limitations for any pollutants not explicitly controlled

by the ELG. The Majority never addresses this express and specific legislative intent that technology-based effluent limits be nationally uniform once an ELG is promulgated.

The inevitable outcome of the Court of Appeals' Majority Opinion would be to promote the very problems of forum shopping, race-to-the-bottom regulation, and regulatory unpredictability that the CWA was intended to prevent. States that imposed stricter BPJ limits would be punished for their efforts by being disadvantaged in attracting or retaining business. Also, regulated entities would face an impossible burden in predicting and planning for effluent limitations, since essentially every permit renewal would require a new BPJ analysis and the potential imposition of new and different technology-based limits. Indeed, in the preamble to the 2015 ELGs, EPA explained its decision not to adopt a rule that relied on state BPJ permitting by noting, among other things, that "BPJ permitting of FGD wastewater would ... unnecessarily burden the regulated industry because of associated delays and uncertainty with respect to permits." 80 Fed. Reg. at 67,852 (Apx. I).

In this context, it is noteworthy that two of Kentucky's neighboring states – Illinois and Tennessee – have rejected the Court of Appeals' analysis and held no supplemental BPJ limits are required at all when an ELG is in place, even if the ELG does not regulate all known pollutants in a waste stream. *See* pp. 18-19, *supra*. Thus, two of Kentucky's nearest competitors offer businesses less onerous and more predictable regulatory regimes. That is precisely the kind of interstate regulatory competition that the CWA sought to eliminate, further demonstrating the conflict between the Majority Opinion and the goals and structure of the CWA.

### 4. The Majority Opinion is contrary to the CWA's intended division of responsibility between the states and U.S. EPA.

The Majority Opinion is also contrary to the CWA's intended division of labor between the state and federal government. Both the circuit court and the Court of Appeals Majority were animated by a concern that the 1982 ELGs were outdated or substantively inadequate, which those courts incorrectly believed supported their decision to require the Cabinet to supplement the ELGs with BPJ limits on any pollutants not subject to specific limits in the ELGs. The circuit court, for example, quoted a 2013 Fact Sheet for the point that the 1982 ELGs "*do not **adequately** address the associated toxic metals*" in FGD wastes, and repeatedly stated its view that it would be unreasonable to suspend stricter regulation based on ELGs issued "some *thirty* years ago."[59] The Court of Appeals similarly concluded that reliance on the 1982 ELGs was incompatible with the CWA's goal of "restor[ing] and maintain[ing]" the nation's waters.[60] Thus, the Majority construes states' BPJ permitting authority as a means to ensure that federal ELGs are substantively adequate and in step with advances in pollution treatment technologies.

But this rationale misconstrues the CWA's division of labor between the states and EPA. The CWA imposes the obligation on the **EPA,** not the states, to regularly review existing ELGs and revise them as necessary. 33 U.S.C. § 1314(m); 33 U.S.C. § 1311(d). *Accord NRDC*, 437 F. Supp. 2d at 1152 (holding EPA could not forego duty to promulgate ELGs and "burden[] the States with the ongoing expense of refining their own [BPJ] standards in response to changing conditions and information"). It is not the duty of state permitting agencies to sit in ongoing review of the continued adequacy of

[59] R. 555-69, Sept. 10, 2013 Opinion & Order at 11 (Apx. C) (bolded emphasis added, italics in original).
[60] Opinion at 14.

EPA's ELG guidelines. "Developing ELGs is a complicated and time-consuming effort," "based on complex engineering and economic studies,"[61] as evinced by the time and effort expended by EPA in revising the 1982 ELGs. *See* pp. 6-9, *supra*. State permitting agencies are not equipped to perform this task on a widespread basis, as would be required by the Majority Opinion. In the 2015 final ELGs, EPA acknowledged this fact, noting "BPJ permitting of FGD wastewater would place an unnecessary burden on permitting authorities, including state and local agencies, to conduct a complex technical analysis that they may not have the resources or expertise to complete." 80 Fed. Reg. at 67,852 (Apx. I).

If Appellees believe EPA has not adequately performed its duty to review and revise ELGs as needed, their remedy is to bring an action against the EPA to perform its duty under the Act, not to attempt to shift the EPA's responsibility onto the states using states' authority to adopt interim BPJ limitations. Indeed, the 2015 revisions to the steam electric ELGs were prompted in substantial part by just such a lawsuit. *See Defenders of Wildlife v. Jackson*, 284 F.R.D. 1 (D.D.C. 2012).

Moreover, the "age" of the 1982 ELGs in force at the time the Trimble Permit was issued was not unique or unusual. EPA has promulgated ELGs for more than 50 industrial categories, and many have not been revised since the 1980s.[62]

In any event, the reasoning of the Court of Appeals' Majority Opinion is not dependent on the age of the underlying ELGs. The Majority holds that states are required to impose ad hoc BPJ limits on any pollutant that is not specifically subject to numeric

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[61] 1996 NPDES Permit Writers Manual, *supra* note 53, at 53 (Apx. M).

[62] *E.g.*, 40 C.F.R § 406.10, *et seq.* (grain mills, revised 1986); 40 C.F.R. § 410.00, *et seq.* (textile mills, revised 1982); 40 C.F.R. § 411.10, *et seq.* (cement manufacturing, revised 1986); 40 C.F.R. § 418.10, *et seq.* (fertilizer manufacturing, revised 1987); 40 C.F.R. § 419.10, *et seq.* (petroleum refining, revised 1985).

effluent limitations in an applicable ELG, regardless of when the ELG was promulgated. Thus, the Majority Opinion imposes an ongoing legal duty on DOW to undertake extensive study of all available information and technological developments related to any pollutant not specifically subject to numeric limitation in an ELG **every time** it reviews a permit subject to a national standard, regardless of how recently the ELG was revised. That is not the law.

In sum, the Court of Appeals' unprecedented interpretation of 40 C.F.R. § 125.3(c) conflicts with the language of the CWA itself, imposes an impossible burden on state permitting agencies, calls into question nearly every NPDES permit based on a national ELG, nullifies provisions of the regulation itself, undermines national uniformity, and conflicts with the CWA's allocation of federal and state responsibility. The Cabinet's interpretation of the CWA and its implementing regulations is not only reasonable, it is the only interpretation that is consistent with the express language and legislative purposes of the CWA. The Court of Appeals' decision should be reversed.

## III. The Majority disregarded this Court's precedents mandating deference to an agency's permissible interpretation of a statute it is charged with implementing.

As the foregoing makes clear, the Cabinet's interpretation of the CWA is the only one that is consistent with the Act's plain language and legislative purposes. Nonetheless, even if there were room for debate about the Cabinet's interpretation, it was improper for the Majority to substitute its own construction of the Act for that of the Cabinet without affording the Cabinet's interpretation the appropriate deference required by this Court's controlling precedents. Under those precedents, the Court of Appeals was required to defer to the Cabinet's interpretation as long as it was a "permissible"

interpretation of the CWA. *Pub. Serv. Comm'n of Ky. v. Commonwealth*, 320 S.W.3d 660, 668 (Ky. 2010). The Majority never engaged in the analysis required by this Court's decisions. For that reason alone, the Majority Opinion should be vacated.[63]

This Court has clearly and repeatedly instructed that "[i]f a statute is ambiguous, the courts grant deference to any permissible construction of that statute by the administrative agency charged with implementing it." *Id. See also Metzinger v. Ky. Ret. Sys.*, 299 S.W.3d 541, 545 (Ky. 2009); *Louisville/Jefferson County Metro Gov't v. TDC Group, LLC*, 283 S.W.3d 657, 661 (Ky. 2009); *Bd. of Trustees of Judicial Form Ret. Sys. v. Att'y Gen.*, 132 S.W.3d 770, 786-87 (Ky. 2003); *Commonwealth v. Petrotek, LLC*, 2015 WL 3826226, at *3-4 (Ky. App. June 19, 2015) (unpublished, attached at Apx. Q); *Commonwealth, ex rel. Stumbo v. Ky. Pub. Serv. Comm'n*, 243 S.W.3d 374, 380 (Ky. App. 2007); *Morgan v. Natural Res. & Envtl. Prot. Cabinet*, 6 S.W.3d 833, 842 (Ky. App. 1999).

Thus, "[s]o long as it is in the form of an adopted regulation or formal adjudication, we review an agency's interpretation of a statute it is charged with implementing pursuant to the doctrine enunciated in [*Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984)]." *Metzinger*, 299 S.W.3d at 545. This framework requires a two-step analysis. First, the Court must determine if the legislature has directly spoken to the question, or instead whether the statute is silent or ambiguous. Second, if there is ambiguity, the Court must determine if the agency's interpretation is a "permissible" one. *Petrotek, LLC*, 2015 WL 3826226, at *3-4 (citing *Chevron*, 467 U.S. at 842-43). "At its second step, *Chevron's* obligatory deference presumes that our legislature 'knows to

[63] This argument was properly preserved for appeal. *See* LG&E Court of Appeals Appellant's Br. at 10-11, 17, 21-22; R. 375-505, Joint Resp. Br. for Respondents at 11.

speak in plain terms when it wishes to circumscribe … agency discretion,'" *id.* (quoting *City of Arlington, Texas v. F.C.C.*, 133 S. Ct. 1863, 1868 (2013), and "[a]ccordingly, reviewing courts must assume that 'ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion.'" *Id.* (quoting *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005)).

The Court of Appeals was required to adhere to that framework in reviewing the Cabinet's interpretation of the CWA and KPDES program. The Cabinet is the agency charged with implementing and administering the KPDES program pursuant to the CWA. Thus, Kentucky courts have recognized it is entitled to deference in its interpretation of the statutes and regulations governing that program. *Commonwealth, Energy & Env't Cabinet v. Sharp*, 2012 WL 1889307, at *10 (Ky. App. May 25, 2012) (unpublished, copy attached as Apx. P) (reversing Franklin Circuit Court for "substituting its own preferred interpretation of the statute over that of the Secretary, despite the fact that the agency's interpretation was ... reasonable..."). Moreover, the Trimble Permit was adopted pursuant to formal notice and comment administrative proceedings, including public hearings, and the interpretation of the Cabinet's CWA regulation was upheld in formal adjudication of the Appellees' administrative appeal challenging the final Permit. *TDC Group*, 283 S.W.3d at 661 (adjudication in administrative appeal entitled to *Chevron* deference).

However, the Court of Appeals did not follow the two-step framework, and its decision should be reversed for that reason alone. The Court of Appeals did not examine whether Congress expressly addressed the question at issue in the text of the CWA itself.

Indeed, the Majority Opinion did not analyze the controlling language of Section 402(a)(1) of the CWA at all, much less find this statutory language to be unambiguously at odds with the Cabinet's interpretation. The only provision of the Act itself discussed at any length by the Majority Opinion is the Act's general statement of purpose, which courts have recognized is not controlling in interpreting specific operational provisions. *United States v. Plaza Health Laboratories, Inc.*, 3 F.3d 643 (2nd Cir. 1993).

If anything, the language of the Act unambiguously **supports** the Cabinet's interpretation, insofar as it expressly states that BPJ limitations should only be established "prior to" establishment of applicable ELGs. 33 U.S.C. § 1342(a)(1). *See also NRDC v. EPA*, 859 F.2d 156, 200 (D.C. Cir. 1988). But even if this language were susceptible to alternative construction such as the one adopted by the Majority, the Court was still required by this Court's precedents to proceed to the second step and affirm the Cabinet's interpretation as long as it was "permissible." *Pub. Serv. Comm'n of Ky.*, 320 S.W.3d at 668.

But the Court of Appeals Majority did not perform this mandatory step of the analysis, either. It never considered whether the Cabinet's interpretation was at least a permissible reading of the CWA and its implementing regulations. If so, the Court of Appeals was required to uphold it, even if the Court of Appeals believed that a different interpretation was more persuasive. Again, for all of the reasons discussed above, LG&E maintains that the Cabinet's interpretation is the best interpretation of the relevant statutory and regulatory provisions. But at a minimum, it was clearly a permissible interpretation. Indeed, the Cabinet adopted the same interpretation set forth by EPA itself in its NPDES Permit Writers Manual. EPA also apparently concurred in the Cabinet's

interpretation when it reviewed, and did not object to, the Trimble Permit in 2009. *Pollution Control Bd.*, 37 N.E.3d at 413 (noting EPA non-objection to permit indicated implicit agreement no BPJ limits were required for wet scrubber wastewaters).

But the Majority never considered whether the Cabinet's interpretation was a "permissible" reading of the Act and its implementing regulations. Instead, the Majority merely substituted its own view of the Act and its implementing regulations – a view which has never been adopted in any other judicial opinion in any jurisdiction – for the Cabinet's interpretation, because the Majority believed its construction would better advance the CWA's broad purposes of "restor[ing] and maintain[ing]" the nation's waterways. That reasoning is wholly incompatible with the principles of agency deference that have been consistently endorsed in this Court's precedents. The Court of Appeals' decision should be reversed.

## IV. The Majority Opinion conflicts with the express directives of the 2015 ELGs.

Not only does the Majority Opinion misconstrue the Cabinet's obligations under the ELGs that were in force when the Trimble Permit was issued, its conclusions are directly contrary to the express directives of the 2015 revisions to the steam electric ELGs. The 2015 ELGs explicitly state that the same effluent limitations in the 1982 ELGs that were used for the Trimble Permit should continue to be used as the basis for regulating FGD wastewaters until after November 1, 2018, and new numeric effluent limits on arsenic, mercury, and selenium should not be imposed before that date. Insofar as the Court of Appeals concluded that the Cabinet is required to undertake a BPJ study to impose numeric technology based effluent limits on FGD wastewaters before that date,

the Court of Appeals decision is contrary to the current controlling federal regulation.[64]

As discussed above, pp. 7-9 *supra*, when EPA published its proposed revisions to the steam electric ELGs in 2013, it expressly recognized that the required "changes to FGD wastewater treatment systems ... would constitute major system modifications requiring several years to accomplish for many plants." 78 Fed. Reg. at 34,480 (Apx. H). EPA noted that "facilities need several years to plan, design, contract, and install major system modifications," because the required modifications "require a significant amount of system design by engineering firms, equipment procurement from vendors, and installation by trained labor forces," and often must be implemented around planned maintenance outages to avoid disruptive shutdowns. *Id.* Accordingly, EPA stated that whatever final revisions were adopted, including those related to FGD wastewaters, should not be imposed on plants until several years after the ELGs' effective date. *Id.*

Accordingly, when the final revised ELGs were published, EPA determined not to require compliance with new technology-based limits set on certain metals in FGD wastewaters for existing power plants until after November 1, 2018. The final revised ELG "allows a permitting authority to determine a date when the new effluent limitations for FGD wastewater ... apply to a given discharger," provided that "[t]he permitting authority **must** make these final effluent limitations applicable **on or after November 1, 2018**." 80 Fed. Reg. at 67,882 (emphasis added) (Apx. I). In selecting the effective date of the new requirements, state permitting authorities are required to consider a variety of factors, including the time needed to construct new treatment facilities and implement operational changes. *Id.* at 67,883. Moreover "for the FGD wastewater requirements

[64] This issue was properly preserved for review. *See* LG&E Court of Appeals Appellant's Br. at 21; LG&E Court of Appeals Petition for Rehearing at 6; LG&E Motion to Supplement Authorities in Supp. of Discretionary Review (filed Dec. 2, 2015).

only, the permitting authority **must** consider whether it is appropriate to allow more time for implementation, **in addition to** the three years before implantation of the rule begins on November 1, 2018" because "EPA's record demonstrates that plants installing the FGD technology basis spent several months optimizing its operation" even after installation, and "[w]ithout allowing additional time for optimization, the plant likely would not be able to meet the limitations...." *Id.* (emphasis added). Thus, EPA determined that state permitting authorities have a mandatory duty to postpone the compliance date for the new FGD effluent limits to provide time for implementation.

Notably, the revised ELGs do not merely postpone implementation of the new limits, they affirmatively direct that the 1982 ELGs' limits on "low volume waste sources" shall be considered the controlling BAT standard for FGD wastewaters discharged before the selected effective date of the new limits, which are classified as "legacy FGD wastewaters" in the revised ELGs. The 2015 ELGs establish separate BAT limits for "legacy FGD wastewaters," which are the same "low volume waste sources" limits that are contained in the 1982 ELGs. 80 Fed. Reg. at 67,883 (Apx. I).[65]

Even if there were ambiguity about whether the 1982 ELGs were applicable to pollutants such as arsenic, mercury, and selenium in FGD wastewaters, there is no such ambiguity in the 2015 ELGs. The 2015 ELGs reflect an explicit regulatory decision by EPA that the technology-based effluent limitations applicable to FGD wastewaters discharged prior to November 1, 2018 shall not prescribe numeric limits derived from the

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[65] *See also* 2015 Dev. Doc., *supra* note 30, at pp. 14-1 – 14-4, 14-9 – 14-12 (Apx. K). The 2015 ELGs provide that for FGD wastewaters, "[d]irect discharges of legacy wastewater are, under this rule, subject to BAT effluent limitations on TSS in such wastewater, which are equal to the existing BPT effluent limitations on TSS in .... low volume waste sources." 80 Fed. Reg. at 67,883 (Apx. I). The 1982 ELGs' BPT limits for "low volume waste" are identical to the 1982 ELGs' "new source" limits for that same category. *See* 40 C.F.R. § 423.12(b)(3) (as promulgated in 1982 at 47 Fed. Reg. at 52,305-52,306 (Apx. G)) (BPT standards); 40 C.F.R. § 423.15(c) (as promulgated in 1982 at 47 Fed. Reg. at 52,307 (Apx. G)) ("new source" standards on low volume waste sources).

newly selected BAT (chemical precipitation followed by biologic treatment).

Thus, even assuming *arguendo* that the Cabinet were required to impose additional numeric BPJ limits under the 1982 ELGs that were in effect when the Trimble Permit was issued in 2010 (which it was not), it is clear that it would not be required to do so pursuant to the newly revised ELGs currently in effect. The Trimble Permit already contains appropriate effluent limits for the pollutants required to be limited by the 2015 revised ELGs for FGD wastewaters discharged prior to November 1, 2018, and the revised ELGs preclude imposition of BPJ limits on other pollutants such as mercury, arsenic, and selenium before that date. Only after the selected compliance date between November 1, 2018 and December 31, 2023 would FGD wastewaters become subject to the express limitations for arsenic, mercury, and selenium in the 2015 revised ELGs' BAT standards.

Accordingly, even if the Permit were vacated and remanded to the Cabinet at this point, it would not be appropriate for the Cabinet to include new technology-based limits on arsenic, mercury, and selenium for FGD wastewaters discharged prior to the post-November 1, 2018 effective date selected by the Cabinet. Accordingly, the Court of Appeals' conclusion that the Permit was invalid due to the omission of BPJ limitations for those pollutants cannot be sustained as a matter of law.

## V. The Majority erred by excusing Appellees' failure to comply with jurisdictional requirements for their appeal.

The Court of Appeals' decision should also be reversed for the additional reason that the Majority Opinion disregarded this Court's precedents requiring strict compliance with jurisdictional statutory requirements for administrative appeals. Appellants failed to comply with KRS 224.10-470, which vests exclusive jurisdiction over appeals from

orders of the Cabinet under Chapter 224 in the Franklin Circuit Court. Appellants filed their appeal in Trimble Circuit, which lacked jurisdiction. The Court of Appeals held this defect was cured by the Trimble Circuit Court's use of the general venue statute to transfer the case to Franklin Circuit, incorrectly concluding that "KRS 224.10-270(1) concerns the proper place for an appeal" and therefore "the issue raised in this case [is] one merely of improper venue," and not subject matter jurisdiction. (Opinion at 8.) That conclusion is erroneous as a matter of law, and requires reversal. [66]

This Court has recently, and repeatedly, reaffirmed the principle that all statutory requirements for administrative appeals are jurisdictional in nature, and therefore strict compliance is required. *Taylor v. Ky. Unemployment Ins. Comm'n*, 382 S.W.3d 826, 831 (Ky. 2012); *Louisville Gas & Elec. Co. v. Hardin & Meade County Prop. Owners for Co-Location*, 319 S.W.3d 397, 400 (Ky. 2010). Unlike ordinary judicial appeals, where substantial compliance has been adopted, "[i]t is well settled that '[w]hen grace to appeal [a decision of an administrative body to the circuit court] is granted by statute, a strict compliance with its terms is required.'" *Hardin & Meade County Prop. Owners*, 319 S.W.3d at 400 (quoting *Bd. of Adjustments of City of Richmond v. Flood*, 581 S.W.2d 1, 2 (Ky. 1978)). "Where the conditions for the exercise of power by a court are not met, .... the court lacks jurisdiction or has no right to decide the controversy." *Id.* Accordingly, "[i]t is a firmly rooted concept of law in this state that the courts have no jurisdiction over an appeal from an administrative agency **unless every statutory precondition is satisfied**." *Taylor*, 382 S.W.3d at 831 (emphasis added).

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[66] This issue was properly preserved for review. *See* LG&E Court of Appeals Appellant's Br. at 24-25; R. 85-100, LG&E's Resp. to Petitioners Mot. for Declaratory Ruling on Venue (Trimble Cir. Ct., filed Apr. 19, 2011); R. 211-25, LG&E Mot. to Set Aside Transfer Order & Renewed Mot. to Dismiss (Franklin Cir. Ct., filed Dec. 9, 2011); R. 278-81, July 5, 2012, Franklin Circuit Court Order.

Courts in other jurisdictions agree that "[w]hen a statute designates a particular court with authority to judicially review the decision of an administrative agency, a **question of subject matter jurisdiction rather than venue** is involved," which is not cured by transferring venue. *Health Enter. of Am., Inc. v. Dept. of Social Servs.*, 668 S.W.2d 185, 187 (Mo. Ct. App. 1984) (emphasis added). *See also Liberty Mut. v. Thomasson*, 317 P.3d 831, 836 (Nev. 2014) (holding statutory forum requirement for administrative appeal pertained to jurisdiction, not venue, so order transferring venue to appropriate forum was vacated and appeal dismissed).

Accordingly, KRS 224.10-270 is necessarily jurisdictional in nature, and non-compliance deprives a court of authority to act. Indeed, the Court of Appeals has previously expressly held this statute to be jurisdictional in *Shewmaker v. Commonwealth*, 30 S.W.3d 807, 808 (Ky. App. 2000), which affirmed the dismissal of an appeal from an order of the Cabinet "on grounds of lack of jurisdiction" for failure to file in Franklin Circuit as required by KRS 224.10-270. The Court of Appeals' conclusion that a failure to comply with KRS 224-10-270 is "one merely of improper venue" cannot be squared with this Court's decisions that all statutory requirements for administrative appeals are jurisdictional, *Taylor*, 382 S.W.3d at 831, or its own precedents recognizing that KRS 224.10-270 specifically is jurisdictional. Indeed, the Court of Appeals did not make reference to any of these precedents.

Thus, the Trimble Circuit Court lacked subject matter jurisdiction over the appeal filed by the Appellants. When a court lacks subject matter jurisdiction, "the only function remaining to the court is that of announcing the fact and dismissing the cause." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (quotation omitted).

"**[A]ny order** issued by a court that did not have proper jurisdiction is void *ab initio....*" *Cabinet for Health & Family Servs. v. J.T.G.*, 301 S.W.3d 35, 39 (Ky. App. 2009) (emphasis added). Thus, the Trimble Circuit's order transferring venue was also void, and it could not have validly conferred jurisdiction on the Franklin Circuit Court. The Trimble Circuit Court had authority only to dismiss the appeal, not to transfer it. Accordingly, the Franklin Circuit Court was also without authority to proceed to judgment, and its orders were also void.

The authorities relied upon by the Court of Appeals are completely inapposite. The court cites *Commonwealth ex rel. Conway v. Thompson*, 300 S.W.3d 152, 162-63 (Ky. 2009), for the proposition that all circuit judges "enjoy equal capacity to act throughout the state;" but that case dealt with a circuit judge's authority to issue a statewide injunction, not statutory conditions on administrative appeals. The Court of Appeals also cited *Dollar General Stores, Ltd. v. Smith*, 237 S.W.3d 162, 166 (Ky. 2007), for the proposition that the remedy for improper venue is "transfer rather than dismissal." But *Dollar General* similarly did not address whether a statutory forum requirement is a jurisdictional requirement for an administrative appeal; it involved a *forum non conveniens* dismissal in a common law slip and fall case.[67]

This Court's precedents compel the conclusion that KRS 224.10-270 is jurisdictional in nature. Therefore, the Trimble Circuit Court's judicial authority was never properly invoked and it lacked jurisdiction to enter an order transferring the case to

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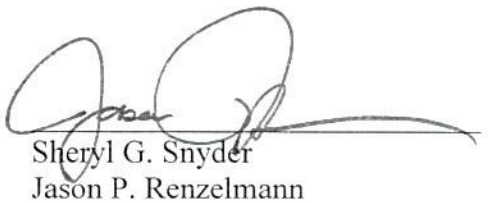
[67] The Franklin Circuit Court incorrectly relied on *Jent v. Commonwealth, Natural Res. & Envtl. Prot. Cabinet*, 862 S.W.2d 318 (Ky. 1993), to hold that the case was preserved by Kentucky's Savings Statute, KRS 413.270(1). However, the *Jent* case and the "savings statute" both address circumstances where a case is dismissed for lack of jurisdiction, and then properly re-filed in the correct jurisdiction. Here, Trimble Circuit did not dismiss the case, it transferred it under the venue statute. That order was void, so the Franklin Circuit Court never properly obtained jurisdiction. Notably, the Court of Appeals did not address the *Jent* decision, much less rely on it for its decision.

Franklin Circuit Court. Under longstanding Kentucky law requiring strict compliance with statutory requirements in administrative appeals, the Trimble Circuit Court's only option was to dismiss the case. The Court of Appeals' cannot undo the doctrine of strict compliance simply by unilaterally declaring certain statutory conditions non-jurisdictional, as it did here. The Court of Appeals Opinion should therefore be reversed.

## CONCLUSION

For all the foregoing reasons, the Court of Appeals Opinion should be REVERSED, and the Cabinet's final order upholding the 2010 Trimble Permit should be AFFIRMED.

Respectfully submitted,



Sheryl G. Snyder
Jason P. Renzelmann
FROST BROWN TODD LLC
400 West Market Street, 32nd Floor
Louisville, KY 40202-3363
(502) 589-5400

John C. Bender
R. Clay Larkin
DINSMORE & SHOHL LLP
250 West Main Street, Suite 1400
Lexington, KY 40507
(859) 425-1000

*Counsel for Appellant, Louisville Gas and Electric Company*